Nos. 17-1717, 18-18

IN THE

Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,

Respondents.

THE AMERICAN LEGION, ET AL.,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF FREEDOM FROM RELIGION FOUNDATION, CENTER FOR INQUIRY, AMERICAN ATHEISTS, INC., MILITARY ASSOCIATION OF ATHEISTS & FREE-THINKERS, AND SECULAR COALITION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are public-interest organizations that advance the rights and freedoms of atheists, agnostics, and nonbelievers.

The Freedom From Religion Foundation, Inc. ("FFRF") is a nationally recognized 501(c)(3) educational nonprofit incorporated in 1978. Its two purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF works as an umbrella for those who are free from religion (freethinkers, atheists, agnostics, and nonbelievers) and who are committed to upholding the Establishment Clause. FFRF currently has 31,900 U.S. members. FFRF ends hundreds of state/church entanglements a year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming.

The Center For Inquiry ("CFI") is a nonprofit organization devoted to promoting reason, science, critical thinking, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI advocates for public policy that is rooted in science, evidence, and objective truth. CFI works to defend the rights of

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[1] The parties have received timely notice of the intent to file this *amicus* brief and have consented to the filing. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

nonbelievers around the world and to protect the freedom of inquiry that is vital to a free society.

American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation," created by the First Amendment, between government and religion. The organization strives to create an environment where atheism and atheists are accepted as members of the nation's communities and where casual bigotry against the atheist community is seen as abhorrent and unacceptable. American Atheists promotes the understanding of atheists through education, outreach, and community-building, and works to end the stigma associated with being an atheist in America.

The Military Association of Atheists & Freethinkers ("MAAF") builds community for atheists and humanists in the military. MAAF connects military members from around the world with each other and with local organizations. MAAF educates and trains both the military and civilian community about atheism in the military and the issues that face us. Where necessary, MAAF identifies, examines, and responds to insensitive practices that illegally promote religion over non-religion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports Constitutional State-Church Separation and First Amendment rights for all service members.

The Secular Coalition for America ("SCA") is a national nonprofit advocacy organization dedicated to

amplifying the diverse and growing voice of the nontheistic community in the United States. Representing nineteen voting member organizations and its own supporters, the mission of SCA is to increase the visibility of and respect for nontheistic viewpoints, and to protect and strengthen the secular character of our government as the best guarantee of freedom for all.

As secular and humanist organizations that promote freedom of conscience for those who do not practice religion, *amici* offer a unique viewpoint on—and share significant concerns about—government display of religious symbols and exclusion of religious minorities and nonbelievers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today, between one-fourth and one-third of Americans identify as religiously unaffiliated, including atheists, agnostics, and persons otherwise not affiliated with religion. Indeed, the unaffiliated now constitute a more numerous group of citizens in the United States than any branch of Christianity, or any other religion. The government's use of prominent religious symbols serves to stigmatize, marginalize, and diminish that large portion of citizens who exercise their constitutional right not to believe or practice a religion.

In evaluating whether such religious displays violate the Establishment Clause, this Court has repeatedly asked whether a reasonable observer would understand the display to advance or endorse religion or a particular religion. Given the growing plurality of Americans who do not affiliate with any religion, including the millions of Americans who do not believe in a divine power, applying that test must account for the perspective of nonbelievers and those unaffiliated with any religion—and must recognize how such religious displays can stigmatize and ostracize that sizeable yet vulnerable class of individuals.

Further, when deciding whether the Establishment Clause permits the government to use the Latin cross—and only the Latin cross—to collectively honor fallen soldiers, the historical practices of the United States military supply perhaps the most useful information. That history reveals that the military scrupulously avoided using sectarian symbols such as

Latin crosses to mark the graves of soldiers who practice a different religion. The military avoided indiscriminate use of Latin crosses not only when laying soldiers to their final resting place, but even when marking temporary graves amidst the chaos of the battlefield.

The military has respected the rights of non-Christian soldiers for the same reason that this Court has prohibited endorsement of religion or sectarian religious symbols: such endorsement tends to stigmatize, marginalize, and diminish citizens who are not affiliated with the endorsed viewpoint. Even if these practices were not coercive or deliberately preferential, they make people's religion relevant, and appear to be relevant, to their status in the political community, and they stigmatize and ostracize religious minorities and nonbelievers.

Finally, the Solicitor General's proposed coercion-only test for evaluating government displays of religious symbols ignores not only this Court's precedent, but also the stigma resulting from such religion-promoting displays. Given the plurality of Americans unaffiliated with religion, moreover, applying a coercion-only test would stigmatize and injure a substantial number of citizens; naked governmental appeals to the supremacy of a particular religion, and official disparagement of religious minorities and nonbelievers, would become fully lawful. The result would disserve the Establishment Clause, and the nation's commitment to religious pluralism and freedom of conscience.

ARGUMENT

I. Using A Latin Cross To Collectively Memorialize Fallen Soldiers Stigmatizes, Marginalizes, And Diminishes Citizens Who Exercise Their Constitutional Right Not To Follow Or Practice A Religion.

When the government purports to collectively honor soldiers' sacrifice by using a symbol of only one religion, it stigmatizes, marginalizes, and diminishes those Americans who do not share the same faith or any faith. Establishment Clause principles have long prevented government from stigmatizing nonbelievers this way. And those principles are particularly salient today, because tens of million Americans—and counting—identify with no religion.

A. The "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When the government selects a single religion's symbol to honor and remember war heroes of many religions and no religion, the practice not only endorses and advances the preferred religion. It also stigmatizes, marginalizes, and diminishes those citizens who exercise their constitutional right not to believe or practice the endorsed religion or any religion. It does so by communicating an unmistakable "message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *McCreary*

County v. ACLU of Ky., 545 U.S. 844, 860 (2005) (internal quotations omitted).

The Court has typically evaluated religious displays, and the potentially stigmatizing messages conveyed by such displays, from the perspective of a "reasonable observer." In particular, the Court has inquired "whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion." *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 270 (4th Cir. 2005). That observer, in turn, is "aware of the history and all other pertinent facts relating to a challenged display." *Salazar v. Buono*, 559 U.S. 700, 728 (2010) (Alito, J., concurring).

When applying this test, moreover, the Court must consider the views of non-Christians and nonbelievers. The test, after all, contemplates a reasonable observer—not a reasonable Christian observer. The reasonable observer of a Christian symbol or display cannot fairly be presumed to be a Christian who grew up surrounded by Christian symbolism to the extent that it seems like an inevitable part of everyday life. Imagine if the shoe were on the other foot: a Christian who takes for granted being surrounded by Latin crosses and other Christian symbols might well think twice about seeing an Islamic crescent or Wiccan pentacle or Atheist atom on a prominent government building, display, or monument, especially one purporting to honor the sacrifice of those with different religious views. A religious minority or nonbeliever would feel the same when the symbol is a large and prominent Latin cross. And that feeling of disfavor is

even more salient for those who, unlike Christians, are part of a religious minority—that is, for those who already confront stigma, disfavor, and discrimination in many aspects of public life.

For this reason, the reasonable observer must internalize the perspective of a person of a different faith or no faith. Such a person will feel the stigma and marginalization of the government's official embrace and display of Christian symbols, and that stigma will produce an "honest and deeply felt offense . . . from the government conduct" displaying religious symbols. *Van Orden v. Perry*, 545 U.S. 677, 696–97 (2005) (Thomas, J., concurring).

B. It is especially important to account for the perspective of non-Christians and nonbelievers, given the tens of millions of Americans who are not affiliated with any religion. Recent polling data demonstrate that between one-fourth and one-third of Americans identify as religiously unaffiliated, including atheists, agnostics, and persons otherwise not affiliated with religion, together often called "nones." *See generally* Brief of American Atheists, Inc. & The Center For Inquiry as *Amici Curiae* Supporting Neither Party at 1-8, *Ne. Pa. Freethought Soc'y v. County of Lackawanna Transit Sys.*, __S.Ct.__ (2018) (No. 18-2743). In 2014, for instance, 55.8 million Americans identified as religiously unaffiliated. Pew Research Center, *U.S. Public Becoming Less Religious* (2015), https://tinyurl.com/ycqlapvz; Pew Research Center, *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* (2012), https://tinyurl.com/oklnbuh. A 2018 report estimated the number of atheists in America at over 64 million.

Michael Shermer, *The Number of Americans with No Religious Affiliation Is Rising*, Sci. Am. (Apr. 1, 2018), https://tinyurl.com/yakkkhwa.

What is more, one recent study indicates that no single Christian denomination or non-Christian religious group is larger than the portion of the population that is unaffiliated with any religion. Gabe Bullard, *The World's Newest Major Religion: No Religion*, Nat'l Geographic (Apr. 22, 2016), https://tinyurl.com/y7j7hax7. In addition, the 2017 American Family Survey, undertaken by Brigham Young University and the Deseret News, reported the proportion of atheists, agnostics, and "nothing in particular" as 33 percent; the "nones" are the largest single group in a survey of religions.[2] *Id.*

These same changes are coming to the U.S. military. In 2017, more than 30 percent of the active duty population of the American military did not affiliate with any religion; this category includes atheists, agnostics, humanists, unknown, unclassified, and those expressing no religious preference. Military Association of Atheists and Freethinkers, *Military Religious Demographics*, https://tinyurl.com/yb8l8r3j. Likewise, "Generation Z," made up of Americans born between 1999 and 2015 who will likely account for most of the enlisted population in years to come, affiliates with religion less than does any preceding generation. Barna Group, *Atheism Doubles Among Generation Z* (2018), https://tinyurl.com/y7oqyd8z ("The percentage

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[2] Jana Riess, *Religious 'Nones' Are Gaining Ground in America, and They're Worried About the Economy, Says New Study*, Religion News Service (Nov. 16, 2017), https://tinyurl.com/y8w6rm9p.

of teens who identify as atheist is double that of the general population."). Those current and future soldiers inevitably feel excluded and ostracized when they see a monument that appears to acknowledge only their Christian colleagues.

We ask those soldiers to risk their lives to defend our country. When we purport to honor them, why would we do so in a manner that disrespects their beliefs?

Even worse, a ruling upholding a purportedly collective war memorial featuring a prominent Christian symbol would reinforce bias and discrimination against nonbelievers. Nonbelievers already face these biases in many aspects of their lives. For instance, almost half of all Americans "would be unhappy if a family member were to marry someone who doesn't believe in God." Pew Research Center, *Political Polarization in the American Public* (2014), https://tinyurl.com/yd2fcpyv. Likewise, 42% of American adults said that it is "necessary to believe in God to be moral and have good values." Gregory A. Smith, *A Growing Share of Americans Say It's Not Necessary To Believe in God To Be Moral*, Pew Research Center: FactTank (2017), https://tinyurl.com/y8m36fxp. And "being an atheist remains one of the biggest liabilities that a presidential candidate can have; fully half of American adults say they would be less likely to vote for a hypothetical presidential candidate who does not believe in God[.]" Pew Research Center, *Faith and the 2016 Campaign* (2016), https://tinyurl.com/yc2woqs7.

These surveys reveal that, despite their growing numbers, atheists and agnostics are oft disfavored in

American political, civic, and social life. They remain vulnerable to government action that reinforces or amplifies such disfavor or that treats them as second-class citizens. And in yoking patriotism and sacrifice to Christianity and Christianity alone, the memorial in this case inflicts new injury to millions of vulnerable Americans who are not affiliated with any religion—including American soldiers risking their lives to defend their country.

II. In Choosing Grave Markers For Fallen Soldiers, The Military Has Recognized That A Latin Cross Does Not Memorialize A Non-Christian.

In claiming that the Latin cross is a neutral and universal symbol of military sacrifice, Petitioners and their *amici* misstate the history of the government's use of the Latin cross to honor war dead. The actual, accurate history confirms that the federal government has long recognized the Latin cross for what it is—a Christian symbol that communicates a message of exclusion to non-Christian soldiers. Aware that the Latin cross stigmatizes non-Christians soldiers when purportedly used to honor their sacrifice, the military has eschewed its use to collectively honor soldiers and has taken pains to avoid using the Latin cross to honor individual non-Christian soldiers, even in the heat of combat. Far from justifying government efforts to promote Christianity in war memorials, this historical practice instead confirms that Latin crosses serve to memorialize Christian soldiers and Christian soldiers alone.

The military's history and practice reflect that the reasonable outside observer would treat a government display of a prominent Latin cross, purporting to collectively memorialize war heroes, as an endorsement of Christianity and as stigmatizing and marginalizing non-Christians. This understanding requires no logical leap: a Latin cross is unmistakably "the preeminent symbol of Christianity." *Salazar*, 559 U.S. at 725 (Alito, J., concurring). For that reason, the Latin Cross marks Christian churches and Christian graves. The cross is worn around the necks of many faithful Christian believers. It also adorns the walls of many Christian homes. And it does so because of the fundamental association between the Latin cross and the New Testament's depiction of the crucifixion of Jesus.

Unsurprisingly, the military has consistently recognized that the Latin cross—the symbol of Jesus's crucifixion—is a distinctly Christian symbol, and hence cannot be used as a secular artifact. As a result, the military has been vigilant, even when permitting its use as an individual grave marker, not to inadvertently mark the grave of a non-Christian with a cross. Thus, although the Latin cross has been used to honor *individual Christian* soldiers, the military has not used it to commemorate *all* fallen soldiers.

When for the first time the military used the Latin cross as a grave marker during the World Wars, it used it as a Christian symbol to memorialize only Christian soldiers. Recognizing that it was invoking the Latin cross's deep Christian meaning, the military took care not to mark the graves of non-Christians with the cross.

Before World War I, the government furnished uniform and rectangular headstones that displayed no religious symbols. U.S. Department of Veterans Affairs, *Pre-World War I Era Headstones and Markers*, http://www.tinyurl.com/odhqrp2. Beginning in World War I, the military marked soldiers' temporary graves with a marker of their faith—the Latin cross for Christians, and the Star of David or a triangular headboard for Jews. Lisa Budreau, *Bodies of War: World War I and the Politics of Commemoration in America*, 1919-1933, at 120 (2010). This was the first time the military prominently commemorated soldiers' deaths with religious emblems of the soldiers' faith. By adopting *both* the Latin cross *and* the Star of David, the military recognized that the Latin cross was an exclusively Christian symbol and an inappropriate monument to fallen Jewish soldiers.[3]

Between the World Wars and during World War II, the military took extra precautions both on the battlefield and in permanent cemeteries to avoid burying non-Christians beneath the Latin Cross. By World War II, army regulations required the identification of soldiers' religions on dog tags to "facilitate[] the burial of the dead with the proper religious ceremonies when conditions permit, and insure[] that the proper type of permanent grave markers will be placed on all graves when reinternment takes place." War Department, *Technical Manual No. 10-630*, at 13 (Sept. 1941).

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[3] The military also recognized that the Latin cross was an "offensive" insignia for rabbis in the chaplaincy. William K. Emerson, *Encyclopedia of United States Army Insignia and Uniforms* 268 (1996).

The military also took measures to restrict the use of the Latin cross as a battlefield grave marker, recognizing that non-Christians should not be buried beneath the cross—even amidst the chaos of active combat. To avoid this affront to soldiers' conscience, the military supplied chaplains and the Graves Registration Service unit with secular "V-shaped wooden boards" to mark each hasty grave "in such a way as to insure identification." War Department, *Field Manual No. 10-63*, at 39 (1945). And for burials where no boards were available, the military directed burial parties to "indicate the grave of a soldier" with "[a] stick, or large rock, or a bayonet with a helmet superimposed." *Id.* at 16; *see also* Office of the Chief Quartermaster, *Handbook for Emergency Battlefield Burials and Graves Registration by Troops*, at 4-5 (1943) ("[I]f the supply [of stakes] does become exhausted, any wood available in the area may be used. In addition, bayonets and other battlefield salvage may be used as markers to insure that location of graves will not be lost.").

During the interwar period, the Graves Registration Service took multiple steps to avoid accidentally honoring service members with another religion's symbol. Initially, when the units tasked with permanently burying the World War I dead could not identify deceased soldiers' religions, they would place either a Latin cross or a Star of David on the graves in "proportion of known Jewish dead to known Christian dead." G. Kurt Piehler, *Remembering War the American Way* 131 (1995). In 1948, however, the Monuments Commission reversed this policy because the Commissioners feared that a Star of David might mark the grave of "an unknown Christian." *Id.* In so

doing, the Commissioners recognized both the deep religious symbolism inherent in both the Latin cross and the Star of David and the indignity caused by burial under the wrong religious symbol.

As the military has become more and more diverse, and as the numbers of nonbelievers serving has grown, the symbols used to commemorate military death have multiplied. Today, the military treats the Latin cross as just one of more than sixty emblems of belief that is available to be inscribed on soldiers' headstones. The government now buries veterans under uniform rectangular headstones with a small space for the veteran's family to inscribe an emblem of their specific religious belief or nonbelief. U.S. Department of Veteran Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, https://tinyurl.com/ma4tceh. The list includes, among other symbols, 20 versions of the cross, the Jewish Star of David, two Muslim symbols, the Mormon Angel Moroni, the Wiccan pentacle, and the Atheist atom. *Id.* And the Department of Veteran Affairs describes the Latin cross emblem as "(1) Latin (*Christian*) Cross," Veteran Affairs, *Available Emblems of Belief*, *supra* (emphasis added), confirming the government's view that the Latin cross symbolizes the Christian religious beliefs of deceased Christian soldiers, and does not belong in a broader secular memorial.

Nobody would argue that the government could decide to use a Latin cross to mark the headstone of each and every veteran buried at Arlington—even veterans who practiced a different religion or no religion at all. Forcing a Latin cross on the grave of a

non-Christian would evince apathy if not antipathy towards the actual religious beliefs of the buried soldier, and would reflect the government's view that Christianity is the one true religion. Here, purporting to memorialize all soldiers through a symbol of only some soldiers' religion has the same effect.

III. The Coercion Test Proposed By The Solicitor General Would Allow Governments To Stigmatize And Marginalize Nonadherents.

The Solicitor General and others ask this Court to disregard the stigmatization and harm to nonbelievers from the government's use and promotion of Christian symbols. They argue that there cannot be an Establishment Clause violation without a showing of coercion. Brief for the United States as *Amicus Curiae* ("Br.") 19 ("compulsion" is the "essence" of an Establishment claim). According to the Solicitor General's brief, compulsion only occurs when someone is forced to observe or participate in any religious ceremony or activity. *Id.* at 23.

Of course, it "is beyond dispute that" the "government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weissman*, 505 U.S. 577, 587 (1992). The Establishment Clause would mean very little, however, if limited to cases of actual coercion—and the religious beliefs and liberty of religious minorities and nonbelievers would face sustained pressure. This Court has long understood that, under the Establishment Clause, the government "may not . . . promote one religion or religious theory

against another or even against the militant opposite." *Epperson*, 393 U.S. at 104. The Establishment Clause forbids government to promote religion in part because such endorsement stigmatizes and marginalizes nonadherents. Yet under a coercion-only test, that restraint would be gone and that type of endorsement could become the norm.

Indeed, the implications of a coercion-only rule would be staggering. Those entering Bladensburg could be greeted by a sign saying, "Welcome to the Christian Town of Bladensburg"; those entering Maryland could encounter a sign stating, "May Christ bless all who enter the state of Maryland." Religious minorities and nonbelievers, who typically lack political power, would be increasingly vulnerable to flagrant promotion of one religion at the expense of the beliefs of everyone else. Even with respect to war memorials, the Solicitor General's proposed rule would authorize far more than is at issue in this case. Governments would no longer need to even claim that a Christian war memorial honors soldiers of other beliefs. A coercion-only standard, for example, would allow a war memorial stating, "We honor the soldiers who sacrificed themselves for America and Jesus Christ."

The resulting regime would be intolerable for religious minorities and nonbelievers, and inconsistent with even minimal respect for religious pluralism and the beliefs of others embodied in the First Amendment. To avoid this result, the Court should again reject a coercion-only approach to the Establishment Clause, which at a minimum must protect religious

minorities and nonadherents from becoming strangers in their own land.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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